

**CITATION:** Guergis v. Novak et al, 2013 ONSC 1130

**COURT FILE NO.:** 11-53210

**DATE:** 20130225

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Helena Guergis, Plaintiff

**- and -**

V. Raymond Novak et al, Defendants

**BEFORE:** Hackland R.S.J.

**COUNSEL:** Stephen Victor, Q.C. and David Cutler, for the plaintiff

Robert W. Staley and Derek J. Bell, for V. Raymond Novak, The Right Honourable Stephen Harper, Shelly Glover and The Honourable Lisa Raitt

Peter N. Mantas and Marisa E. Victor, for Guy Giorno

Wendy J. Wagner, for Axelle Pellerin

Paul D'Angelo, for the Conservative Party of Canada

Paul Le Vay for Arthur Hamilton and Cassels Brock & Blackwell LLP

**COSTS ENDORSEMENT**

[1] The defendants, the moving parties, seek their costs of this motion on a partial indemnity scale, on the basis that they were successful in the result within the meaning of Rule 57.01 of the *Rules of Civil Procedure*. The plaintiff properly concedes that the defendants, with the exception of Arthur Hamilton and Cassels Brock & Blackwell LLP are entitled to their costs and her counsel agrees that the scale of costs is partial indemnity. In my opinion Mr. Hamilton and the Cassels Brock law firm were also substantially successful and are also entitled to their partial indemnity costs. The defendant Derrick Snowdy did not participate in the motion.

[2] The issue is the appropriate quantum of costs to be awarded. The following chart shows the fees and disbursements claimed by the defendants, which total \$205,000 in fees (rounded) and \$20,000 in disbursements.

<b>Party</b>	<b>Partial Indemnity</b>	<b>Disbursements</b>
Novak, Harper, Glover, Raitt	\$58,702.20	\$10,587.19
Pellerin	\$23,811.36	\$2,250.94
Giorno	\$50,220.14	\$2,712.24
Hamilton / Cassels , Brock & Blackwell	\$36,973.00	\$1,833.73
Conservative Party of Canada	\$35,841.54	\$2,902.51
<b>Total</b>	<b>\$205,969.68</b>	<b>\$20,286.61</b>

[3] Each of the 5 defendants or groups of defendants shown on the chart above were represented by separate counsel and each set of counsel are seeking costs and disbursements in the sums reflected in the chart.

[4] The 5 groups of defendants emphasize that in the presentation of their oral argument on the motion, which occupied a period of 2½ days, they co-operated by dividing up the presentation to avoid duplication in time and in resultant legal fees. As well, they presented their costs submission as a consolidated document. The plaintiff's principal submission is that apart from oral argument and the costs outline, the defendants engaged in a highly duplicative and repetitive exercise resulting in over-lawyering and excessive fees. I will return to a discussion of that issue.

[5] The plaintiff had sought damages against the moving party defendants in the amount of \$1.3 million, claiming conspiracy, defamation, misfeasance in public office, intentional infliction of mental suffering, negligence, breach of fiduciary duty, breach of duty of good faith and breach of confidence. These causes of action were joined with claims for aggravated and punitive damages. By reasons for judgment reported at *Guergis v. Novak et al*, 112 O.R. (3d) 118, this court struck out the plaintiff's claims, for the most part without leave to amend.

[6] I turn to a consideration of the factors identified in Rule 57 in considering the quantum of costs.

**Complexity of the Proceeding**

[7] This was a pleadings motion (no evidence, no cross-examinations) and accordingly the only documentation in issue before the court was the Statement of Claim. There was also a non-controversial affidavit from the Conservative Party of Canada. The defendants argue however that the array of causes of action pleaded in the 31 page Statement of Claim engaged a number of substantive issues that needed to be carefully researched and prepared.

**Importance of the Issues**

[8] The defendants argue that this motion was critically important in that it effectively terminated the action. They say that the issues also engaged important matters of principle and law. In particular, the action and motions raised important issues of Crown prerogative and Parliamentary privilege, and arguments were advanced and rejected that would have served to undermine the scope of the protections afforded by those doctrines.

[9] Due to the large number of causes of action pleaded and the length and structure of the Statement of Claim, I would agree that the legal issues were of some complexity. On the other hand, this was a pleadings motion, argued without evidence and cannot therefore be considered highly complex. I do however agree that the issues raised, particularly with respect to the doctrines of executive privilege and parliamentary privilege are of very considerable importance, particularly as they apply in this case to the Office of the Prime Minister of Canada.

[10] Rule 57.01 also invites a consideration of whether a party took any step in the proceeding that was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution. The defendants argue that the court's finding that in attempting to re-litigate the Canadian Human Rights jurisdictional ruling there was an abuse of process, thereby invoking these criteria in Rule 57. I do not accept this argument. The action as a whole was not viewed as an abuse of process. Further, I do not accept that the failure of plaintiff's counsel to concede the application of the Canadian Human Rights Commission's ruling, in advance of the argument of this motion, should attract costs consequences under Rule 57.

[11] Importantly for this case, Rule 57.01(1)(e) invites scrutiny of "the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding." In addition,

Rule 57.01(h)(ii) provides that in exercising its discretion to award costs the court may consider whether it is appropriate to award more than one set of costs where a party “in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer.” These provisions support the courts discretion, when fixing costs to take into consideration unnecessary duplication of effort or unnecessary separation of counsel who are defending the same or very similar interests.

[12] Rule 57.01(1)(0.6) of the *Rules of Civil Procedure* codifies the principles set out in the Court of Appeal’s decision in *Boucher v. Public Accountants Council for the Province of Ontario* 2004, 71 O.R. (3d) 291 (C.A.). In *Boucher*, the Court emphasized the importance of costs being fixed in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, having regard to the expectations of the parties, rather than an amount fixed by the actual costs incurred by the successful litigant.

[13] The plaintiff argues that apart from oral argument and the costs submissions, the defendants engaged in what was a significant duplication of effort with respect to the preparation of the motion both with respect to the legal research performed and the duplicative argument contained in the various defendants facta and the over-lapping case law in the defendants’ briefs of authority. I quote paragraph 8 of the plaintiff’s costs submissions.

By way of example, the issue of the absolute privilege defence was dealt with extensively in the Factums of all of the Government Defendants, Pellerin, and Giorno, citing many of the same cases and making the same arguments. The issue of conspiracy was also dealt with at length in all of the moving Defendants’ Factums, with the Defendants making many of the same arguments therein and citing the same cases for the same propositions. There was also considerable overlap and duplication in the moving Defendants’ Factums in relation to the issues of qualified privilege, negligence, and intentional infliction of mental suffering.

[14] In my view there was significant overlap in the facta of the two groups of defendants with similar interests i.e. (1) the Novak, Harper, Glover, Raitt group and (2) Mr. Giorno. At least for the purposes of this motion Mr. Giorno’s interests appear to be identical to those of Mr. Novak and Mr. Harper. Not surprisingly, their respective facta cover the same ground. I recognize that Mr. Giorno has the right to choose to be separately represented from other defendants with whom he has an apparently identical interest, but for the purpose of fixing costs on a pleadings

motion such as this, I think the court is entitled to consider the duplication of the time and legal costs which flow from this choice. This is contemplated by Rule 57.01(1)(h)(ii).

[15] In applying the *Boucher* principle which focuses on the amount of costs that an unsuccessful party could reasonably expect to pay in respect of this motion, (codified in Rule 57.01(1)(0.6)), I make two observations. When a plaintiff, as in this case, chooses to sue a wide variety of defendants on the basis of accusations of conspiracy and bad faith, the expectation must be that the claims will be vigorously defended and those defendants with different interests will be separately represented and those with similar interests may or may not be separately represented. In any event, the plaintiff's expectation here must have been that the defendants would be incurring substantial costs in the defence of this action. At the same time, as I have just observed, there should be a reasonable expectation that costs would not be payable to multiple counsel putting forward an identical position.

[16] Mr. Giorno's counsel appears to have spent approximately 300 hours in the preparation of the motion and counsel for the Novak group apparently 250 hours. In view of what I regard as significant duplication, I would award one set of costs to the defendants Giorno and the Novak group. I view the other defendants as having markedly different interests involving substantially different legal arguments with the result that separate costs to these defendants are warranted.

[17] The plaintiff also challenges the hourly rates employed by defence counsel. The hourly rates employed by government defendants reflect the significantly discounted rates allowed under Treasury Board guidelines. The argument is that these rates, while discounted to meet Treasury Board guidelines, are nevertheless full indemnity rates and I am asked to discount these rates by a further amount of approximately 40% to reflect what would be a partial indemnity scale. I decline to give effect to this argument. In my opinion, the question of what constitutes an appropriate hourly rate for any claim for costs is determined by referring to the criteria in Rule 57.01 and not by the terms of the retainer between counsel and his or her client. This is subject to the proviso that costs must not be awarded in excess of counsel's hourly rate in non-contingency fee situations. I would follow the decisions of this court in *Mantella v. Mantella*, [2006] O.J. No. 2085 (S.C.J. at para. 7 and *Marcus v. Cochrane*, [2012] O.J. No. 1663 (S.C.J.) at paras. 22-23.

[18] In my opinion the hourly rates claimed by all counsel are demonstrably reasonable.

[19] In relation to disbursements, I intend to reduce the large amounts claimed for photocopying but otherwise I accept the amounts claimed.

[20] Keeping in mind the considerations in Rule 57.01 and, in particular: (1) this was a pleadings motion; (2) the principle in the *Boucher* decision that the reasonable expectations of the party paying the costs requires consideration; and (3) the established rule that in exercising the court's discretion to fix costs, the process is not to simply award the amounts claimed by multiplying hours docketed by hourly rates, I would allow the defendants the amounts reflected in this chart.

<b>Party</b>	<b>Amount Allowed</b>	<b>Disbursements</b>
Giorno, Novak, Harper, Glover, Raitt	\$40,000.00	\$6,500.00
Pellerin	\$18,000.00	\$ 900.00
Hamilton / Cassels , Brock & Blackwell	\$25,000.00	\$1,600.00
Conservative Party of Canada	\$25,000.00	\$1,560.00
<b>Total</b>	<b>\$108,000.00</b>	<b>\$10,560.00</b>

[21] The amount awarded to the Novak group and Mr. Giorno will be apportioned between these defendants as they may agree and in the absence of agreement, I may be spoken to.

[22] The defendants, moving parties, are awarded their costs and disbursements in the amounts set out in the chart above in paragraph [20] plus applicable HST thereon. These amounts are payable by the plaintiff to the defendants within 30 days of the release of this endorsement.

*"Hackland R.S.J."*

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**Mr. Justice Charles T. Hackland**

**Released:** February 25, 2013

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Helena Guergis

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**COSTS ENDORSEMENT**

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**HACKLAND R.S.J.**

**Released:** February 25, 2013